SUPREME COURT, U.S.
Supreme Court, U. S.
FILED
JAN 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-952

MABEL FLINN, GENEVA LYNN, AND GARNET LOISEAU,

Petitioners,

vs.

FMC CORPORATION and LOCAL 9, TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Charles E. Guerrier
Jane M. Picker
Barbara Kaye Besser
Barbara H. Mitchell
620 Keith Building
1621 Euclid Avenue
Cleveland, Ohio 44115

Attorney for Petitioners

TABLE OF CONTENTS

Citations To Opinions Below. 1

Jurisdiction 2

Questions Presented For Review 2

Statutory Provisions Involved 3

Statement Of The Case. 3

Reasons For Granting The Writ. 13

1. To Clarify The Standard Applicable In Determining When A Proposed Settlement Of A Title VII Case, Certified As A Class Action Under Rule 23(b)(2), Meets The Requirements Of Rule 23(e) 13

a. Compromise Of A Class Action Under Rule 23(e) Is Permitted When The Fairness Standard Is Met . . 13

b. Application Of The Fairness Standard To The Settlement Of A Title VII Action 16

c. Application Of The Fairness Standard In The Present Case Conflicts

BLEED THROUG

With Saylor v. Lindsley
And With The Rule
Making Statute Of 1934. . . 19

2. To Determine Whether A
Court Imposed Settlement Of
A Title VII Action Over The
Objections Of All Named
Plaintiffs Violates The Fifth
Amendment's Guarantee Of
Due Process 21

Conclusion 22

Appendix:

Order Of The District Court,
November 19, 1973. . . . . A-1

Order Of The District Court,
April 5, 1974 . . . . . A-4

Notice Of Proposed Settlement . . . A-6

Order Of The District Court,
August 19, 1974. . . . . A-13

Opinion Of The Court Of Appeals . . A-18

Rule 23, Federal Rules of Civil
Procedure. A-33

Certificate of Service A-37

OUGH

TABLE OF AUTHORITIES

Cases

Air Line Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc., 490 F. 2d 636 (7th Cir. 1973), cert. denied, ___ U. S. ___, 94 S. Ct. 2406 (1974). 17, 18, 19

Air Line Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc., 455 F. 2d 101, 106 (7th Cir. 1972) . . 16, 17

Albemarle Paper Co. v. Moody, ___ U. S. ___, 95 S. Ct. 2362 (1973) 13

Bryan v. Pittsburgh Plate Glass Co., 494 F. 2d 799 (3rd Cir. 1974), cert denied sub nom. Abate v. Pittsburgh Plate Class Co., 419 U. S. 900 (1974). 18

City of Detroit v. Grinnell Corp., 495 F. 2d 448 (2nd Cir. 1974). 15

Franks v. Bowman Transportation Co., 495 F. 2d 398 (5th Cir. 1974), cert. granted, ___ U.S. ___, 96 S. Ct. 1421 (1975). . . 13

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 13

LEED THROUGH

Neuwirth v. Allen, ___ F. Supp. ___ (S.D.N.Y. 1964), aff'd. 338 F. 2d 2 (2nd Cir. 1964). . . . 15

Newman v. Stein, 464 F. 2d 689 (2nd Cir. 1972) 15

Norman v. McKee, 431 F. 2d 769 (9th Cir. 1970), cert. denied 401 U. S. 912 (1971) 15

Palmer v. General Mills, Inc., 513 F. 2d 1040 (6th Cir. 1975) . . 13

Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U. S. 414 (1968) 15, 16

Rios v. Enterprise Association Steamfitters Local 638, 501 F. 2d 622 (2nd Cir. 1974). 13

Robinson v. P. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971). . . 17, 18, 19

Saylor v. Lindsley, 456 F. 2d 896 (2nd Cir. 1970) 19, 20

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 21

Young v. Katz, 447 F. 2d 431 (5th Cir. 1971). 15

CONSTITUTION, STATUTES AND RULES

United States Constitution,
Fifth Amendment 22

Federal Rules of Civil Procedure,
Rule 23 . . . . . passim

Federal Rules of Civil Procedure;
Rule 23.1 14

28 U.S.C. § 1254(1) 2

The Rule Making Statute Of 1934,
28 U.S.C. § 2072 (1948) 19, 20

Title VII of the Civil Rights Act of
1964 (42 U.S.C. § 2000e, et seq.) passim

OTHER AUTHORITIES

3B Moore's Federal Practice
(2d ed. 1974) 14

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975
NO. 75-_____

MABEL FLINN, GENEVA LYNN,
and GARNET LOISEAU,

Petitioners,

- v -

FMC CORPORATION and LOCAL 9
TEXTILE WORKERS UNION OF
AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fourth Circuit

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgment entered in the above-entitled case on October 6, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not officially reported. It can be found at 10 EPD ¶ 10,408,

HROUGH

and is set forth in the Appendix at page A-18. The opinion of the District Court approving the compromise settlement is unreported. It is set forth in the Appendix at page A-13. Other opinions (unpublished) of the District Court in this case which are relevant to this petition are: Order of November 19, 1973, at A-1; Order of April 5, 1974, at A-4; Notice of Proposed Settlement of June 5, 1974, at A-6.

JURISDICTION

The judgment of the United States Court of Appeals for the Courth Circuit was entered on October 6, 1975. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 United States Code, § 1254(1), review of a judgment of the United States Court of Appeals for the Fourth Circuit having been requested.

QUESTIONS PRESENTED FOR REVIEW

1. Does Rule 23(e), Federal Rules of Civil Procedure, permit settlement of a Title VII class action certified under Rule 23(b)(2) when the named plaintiffs all object to the proferred settlement?

2. Does a court imposed settlement of a Title VII action over the objections of all named plaintiffs violate the Fifth Amendment's guarantee of due process?

ED THROUGH

STATUTORY PROVISIONS INVOLVED

This case involves various provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. This case also involves the provisions of Rule 23, Federal Rules of Civil Procedure, fully set forth in the Appendix, infra, at page A-33.

STATEMENT OF THE CASE

This action was filed by Petitioners, Mabel Flinn, Geneva Lynn and Garnet Loiseau, in the United States District Court for the Northern District of West Virginia, Parkersburg Division. Before instituting suit, the three female employees had filed charges of discrimination (dated November 15, 1968) with the Equal Employment Opportunity Commission (EEOC), alleging that their employer, a manufacturer of synthetic fibers, maintained an unlawful policy of job assignment, work assignment and seniority, which resulted in female employees earning less than male employees. It was also alleged that the Company's seniority system resulted in discrimination against women with respect to lay-offs, vacations and shift assignments. Following an investigation and an attempt at conciliation, the EEOC notified the plaintiffs of their right to sue in federal district court.

The complaint, styled as a class action,

ED THROUGH

was filed on May 24, 1971. The FMC Corporation (petitioners' employer) and Local 9, Textile Workers Union of America, AFL-CIO (petitioners' union) were named as defendants. It alleged that the defendants had violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.) and 42 U.S.C. § 1981 by discriminating against the plaintiffs based upon their sex. In addition, the complaint alleged that the defendant union had violated its duty of fair representation owed to the plaintiffs (29 U.S.C. § 151, et seq.).

More specifically, it was alleged that the defendant company, in its initial hiring and assignment decisions, segregated its male and female employees, assigning men to those jobs which carried a fixed hourly wage, while assigning women to those jobs which were compensated on a production or incentive basis. [1] Additionally, those jobs to which women were assigned were the jobs most affected by technological changes which, because of the nature of the industry and product being produced, have a significant and frequent impact upon the defendant corporation's operations.

The complaint further alleged that the impact of these practices penalized the female employees, while male employees did not suffer a corresponding

---

[1] In the one department where females were employed on an hourly basis, it was alleged that the hourly rates were substantially less than those paid to men doing comparable jobs.

LEED THROUGH

limitation upon their employment opportunities. It was contended that this disparate treatment was the result of acts committed by the defendant employer and that the effects of this discrimination were perpetuated by the collective bargaining agreement entered into by the two defendants.

The collective bargaining agreement in effect at the time the action was filed had been unchanged since 1942. It provided three types of seniority: plant seniority, which was used as the basic factor for figuring adjusted seniority; adjusted seniority, which was used to determine the order of lay-off and recall; and departmental seniority, which was used for promotional and bidding purposes within a given department. So long as an employee did not transfer out of the department to which originally assigned, plant, adjusted and departmental seniority dates remained the same. However, when an employee changed departments, the employee's departmental seniority date became the date of entry into that department. An employee's adjusted seniority date was established by taking the new departmental seniority date and adding to it one-half of the total plant service acquired prior to the most recent change in departmental status.

The effect of this seniority system was to lock female employees into all-female departments, which were more vulnerable to forced transfers or lay-offs due to technological change.

In the case of the petitioners, the effect of this system was dramatic. Garnet Loiseau was

BLEED THROUGH

first hired at the Parkersburg facility in 1935. The court record indicates that between 1935 and February, 1972, her job assignment changed fifty-five (55) times. As of February, 1972, her adjusted seniority date was May 28, 1955, and her departmental seniority date was June 17, 1968. Mabel Flinn, first hired in 1932, had an adjusted seniority date of February 7, 1948, and a departmental seniority date of June 25, 1963. Geneva Lynn was first hired in 1941, and due to numerous job reassignments, her adjusted seniority date became January 30, 1961, while her departmental seniority date was June 3, 1963.

In their prayer for relief, the plaintiffs sought to enjoin the discriminatory employment practices alleged, back pay, costs and attorneys' fees.

Following the filing of the complaint, it was stipulated among counsel for the parties that the "matter" was to be remanded to the EEOC in order to attempt to secure voluntary compliance and/or conciliation and that the district court proceedings would be stayed pending the outcome of conciliation attempts. After these negotiations proved fruitless, the parties returned to court, with the defendants filing their answers to the complaint on October 12, 1971.

During the next one and one-half years, numerous motions were filed by the plaintiffs, including a motion for summary judgment (February 8, 1972), an amended motion for summary judgment (February 22, 1972), a motion to appoint a special master pursuant to Title VII (April 2, 1972), a motion to amend the

BLEED THROUGH

complaint (June 5, 1972), a motion to certify the case as a class action (June 5, 1972), and a motion to intervene (August 28, 1972). In addition, eight (8) sets of interrogatories were served upon the defendants. On June 19, 1973, the district court held a hearing on these motions. Following this hearing, the court denied plaintiffs' motions for summary judgment and for the appointment of a special master, granted the motions to amend and to intervene and certified the proceedings under Rule 23(b)(2), Federal Rules of Civil Procedure. The class was defined to include, "all female union members employed in the Converting Department at FMC's Parkersburg facility as of June 19, 1973." (Order of June 19, 1973). The order did not direct provision of notice to any class members.

The Court in its order of June 19, 1973, also directed counsel to prepare for trial pursuant to local rule.

However, at a pre-trial conference on November 7, 1973, counsel for the parties submitted a settlement agreement to the district court. In the agreement, the parties noted that changes in the collective bargaining agreement and in the employer's affirmative action program provided the "necessary and desirable prospective relief to which all female members are entitled, and that no future problems are anticipated." The class of plaintiffs was redefined by the parties to include "all of those hourly paid bargaining unit female members of the Parkersburg plant of the Company's work force on the active payroll as of December 31, 1972 . . . ."

BLEED THROUGH

Pursuant to this agreement, the defendants would pay $58,000 into the court, of which $48,000 would be "apportioned among the plaintiffs in such manner as the Court shall determine." The remaining $10,000 was specifically recommended as the appropriate amount for the court to award as plaintiffs' counsel fees and expenses. It was also provided that in the event of court approval of the settlement agreement, the plaintiffs' case would be dismissed with prejudice.

On November 19, 1973, the Court issued an order adopting the above-described provisions of the November 7, 1973, settlement agreement. The class was redefined without providing the direction of notice to the new class members encompassed by this order. The defendants were ordered to pay $58,000 into the court, $10,000 of which was to be paid for the services of the plaintiffs' attorneys of record, and $48,000 was "to be apportioned among the plaintiffs in such manner as the Court shall determine based upon further argument or evidence . . . ." (A-2).

The parties were directed to submit briefs to the Court setting forth their views as to how the $48,000 should be apportioned. Plaintiffs' counsel's earlier motion for payment of fees prior to the entry of a final order was taken under advisement. (A-2)

On April 5, 1974, the Court entered a second order relating to the settlement. This order states that "having been advised by counsel that an agreed settlement of all claims presented in this

civil action has been reached", the next step was to determine the amount of fees which should be paid to plaintiffs' counsel and "to designate the distributees of the settlement sum and to determine the amount of that sum to which each distributee is entitled . . . ." (A-5).

A proposed notice of settlement was submitted to the Court, and discussed during hearings held May 27, and 28, 1974. The notice, approved by the Court, began by providing that "all of the prospective substantive relief available to the claimants has already been granted, outside of litigation, by changes in work practices and seniority structures and through negotiations between the defendant Company and Union." (A-8). The notice went on to outline the manner in which the $58,000, deposited with the Court was to be distributed. (A-9, A-10).

It created three subclasses of claimants differentiated according to the amount of their plant seniority. The class members in the subclass of individuals holding the greater amount of seniority were to receive $225.00 per person. The dollar amounts awarded the individuals in the sub-class holding the least seniority were each awarded $85.00. Class members in the subclass of intermediate seniority were allocated $170.00 each. (A-9, A-10). The notice also provided an allocation of $10,000 to the Plaintiffs' counsel as a reasonable fee. (A-11).

The notice provided that if "any member of the class wishes to object to the proposed settlement or does not wish to participate therein, she

BLEED THROUGH

may object by serving written notice" directed to the clerk of the court. (A-11, A-12).

Of the 253 individuals identified as members of the class, five expressed dissatisfaction with the settlement (A-15), including all the original plaintiffs in the class suit: Mabel Flinn, Geneva Lynn, and Garnet Loiseau, petitioners here.

On August 2, 1974, the Court held a hearing on the proposed settlement, at which the five women testified who were dissatisfied with the settlement.

Each of the three petitioners testified that the amount which she would receive under the settlement ($255.00 each) was not adequate compensation in view of the loss which she had suffered over the years.[2] In addition, the testimony of these women pointed out that those changes in the seniority system, which had already gone into effect as a result of collective bargaining, were of questionable value, since the Parkersburg plant was being shut down. In addition, the Plaintiffs also testified that they had never authorized their counsel to enter into the proposed settlement agreement or counsel to accept $255.00 on their behalf in settlement of their claims.

---

[2] These losses were estimated in a brief submitted by Plaintiffs on November 19, 1973, setting forth their theory of distribution of the $48,000. The estimated losses included $14,000 for Mabel Flinn and $14,000 for Garnet Loiseau. Geneva Lynn's loss was estimated to be $16,000, although she had stated them to be $28,000 since 1964 when the defendants deposed her. This deposition was filed with the Court.

After hearing the testimony of these five women, the Court orally approved the settlement as "just and meeting the standards of fairness and reasonableness." The fact that the plant where the Plaintiffs worked was closing was considered by the Court to be extraneous to the issue of the fairness of the settlement. In addition, the Court accepted the blanket statements of counsel that the collective bargaining process had provided all available prospective relief. The Court's apparent only concern was whether the formula for distribution of the $58,000 paid into Court almost a year earlier was appropriate.

On August 19, 1974, an order approving the settlement was entered, thereby forever releasing and discharging the defendants from any and all claims arising out of the matters alleged in the petitioners' complaint. (A-15, A-16). The provisions governing attorneys' fees was the only provision of the settlement which the Court failed to approve as originally proposed. Rather than awarding Plaintiffs' counsel the $10,000 originally requested, the Court ordered $3,000 to be paid to Plaintiffs' counsel who was then to submit additional information to the Court to substantiate the claim for the remaining $7,000 sought. Copies of counsel's affidavit was served, pursuant to Court order, upon opposing counsel and also upon each of the objecting parties in order to provide for the filing of objections. A subsequent order, entered September 17, 1974, awarded the additional $7,000 to Plaintiffs' counsel.

After having secured new counsel, petitioners

BLEED THROUGH

filed a notice of appeal from the decision of the court approving the settlement and dismissing their claims.

On October 6, 1975, the Court of Appeals for the Fourth Circuit affirmed the district court's order, finding no abuse of discretion on the part of the trial court. In its opinion, the Court of Appeals concluded that the notice to class members (which contained no mention of either a hearing on objections or of the date of such hearing) had provided an adequate notice of the hearing on objections. (A-25, A-26). The Court also concluded that the petitioners (who had testified at the hearing on objections that they had never authorized their retained counsel to negotiate a settlement on their behalf) had been represented in the negotiations by their retained counsel. After recognizing that the objecting plaintiffs were required to "be given the opportunity to retain new counsel to represent them in objecting to the settlement and to be heard in opposition" (A-26), the Court of Appeals concluded that the petitioners (who were never advised by the district court of their right to separate representation and who did not retain new counsel until after court approval of the settlement) had been granted this right.

Characterizing the petitioners' case to be more of a complaint about seniority and transfer rights under the collective bargaining agreement than about sex discrimination the Court of Appeals agreed with the district court's conclusion that the plaintiffs' claims

BLEED THROUGH

were weak. In reaching this decision, the Court apparently failed to consider relevant decisions of this and other courts which have scrutinized present practices in order to determine whether they perpetuated the effects of past discriminatory practices. See, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, __ U.S. __, 95 S. Ct. 2362 (1975); Rios v. Enterprise Association Steamfitters Local 638, 501 F. 2d 622 (2nd Cir. 1974); Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), cert. granted, ___U.S. __, 96 S. Ct. 1421 (1975); Palmer v. General Mills, Inc., 513 F. 2d 1040 (6th Cir. 1975).

REASONS FOR GRANTING THE WRIT

1. To Clarify The Standard Applicable In Determining When A Proposed Settlement Of A Title VII Case, Certified As A Class Action Under Rule 23(b)(2), Meets The Requirements Of Rule 23(e).

   a. Compromise Of A Class Action Under Rule 23(e) Is Permitted When The Fairness Standard Is Met

In holding that the district court did not abuse its discretion in approving the settlement in this case, the Court of Appeals took guidance primarily from legal precedents that had been developed in stockholder derivative actions

BLEED THROUGH

POOR COPY

and in antitrust litigation. The Court at no time discussed the standard which a proposed settlement of a class action must meet under Rule 23(e) and whether application of the required standard may lead to dissimilar results in suits seeking to vindicate corporate as opposed to individual rights.

The history of Rule 23 prior to its amendment in 1966 had indicated that class actions were essentially of two types - those actions seeking to enforce common or derivative rights usually at issue in corporate litigation and those filed to vindicate individual rights of members of a wronged class. Where a named plaintiff sought to enforce common or derivative rights, the action could not be dismissed unless the interests of all class members were considered. However, where no question of common or derivative rights was involved, a plaintiff could settle or dismiss an action with impunity as long as other class members had not earlier intervened in the suit. 3B Moore's Federal Practice, ¶ 23.80[4] at 23-1551, ¶ 23.1.24 [2] at 23.1-405.

With the 1966 amendments to Rule 23 and the adoption of Rule 23.1, the members of a class were required to be provided with notice of any proposed settlement or dismissal and subsequent approval of the court was necessary. Although the rules provided no guidance as to the standard to be used in determining whether a settlement should be approved, the courts evolved the standard of fairness, reasonableness and the best

BLEED THROUGH

interests of the parties. Norman v. McKee, 431 F. 2d 769 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971); City of Detroit v. Grinnell Corp., 495 F. 2d 448 (2nd Cir. 1974).

The standard of fairness, while referred to as the appropriate standard both in class actions seeking to vindicate individual as well as corporate rights, was not applied in the same fashion in each. In stockholder derivative suits and other proceedings where the named plaintiff was prosecuting a claim on behalf of a corporation, courts refused to approve a settlement solely on the basis of the approval of the parties. Where the right at stake was common and joint, corporate well-being was typically the focus of the litigation. Unanimity among class members therefore was never viewed to be necessary for a settlement to be fair. See, Young v. Katz, 447 F. 2d 431 (5th Cir. 1971); Neuwirth v. Allen, ___ F. Supp. (S.D.N.Y. 1964), aff'd. 338 F. 2d 2 (2nd Cir. 1964); Norman v. McKee, supra.

Application of the fairness standard did not mandate the same result when reviewing class settlements involving individual interests. See, Newman v. Stein, 464 F. 2d 689, 692, fn. 6 (2nd Cir. 1972). In Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U. S. 414 (1968), a proceeding for reorganization of a corporation under Chapter X of the Bankruptcy Act, this Court recognized the problems presented by a settlement which was not fair to the individual interests of some

LEED THROUGH

BLEED THR

persons before the court. The Court in Protective Committee stated:

> . . . this Court has held that a plan of reorganization which is unfair to some persons may not be approved by the court though the vast majority of creditors have approved it.
> 390 U. S. at 435.

Thus, in such suits, the well-being of the various individuals whose rights were being litigated had to be separately considered.

b. Application Of The Fairness Standard To The Settlement Of A Title VII Action

Title VII actions illustrate well the differences between cases based upon a common corporate question and those brought to enforce individual rights.

As the Court of Appeals for the Seventh Circuit has stated, in Title VII, as opposed to in corporate actions:

> [t]he real party in interest . . . is the employee alleged to have been discriminatorily treated. He is completely free to accept or reject the proposals of union or employer as well as the position taken by the [Equal Employment Opportunity] Commission. Air Line Stewards and Stewardesses

> Association, Local 550 v. American Airlines, Inc., 455 F. 2d 101, 106 (7th Cir. 1972).

In Robinson v. P. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971), the Fourth Circuit also noted that Title VII actions should not be subject to the rough justice of majority rule, stating:

> The rights assured by Title VII are not rights which can be bargained away - either by a union, by an employer or by both, acting in concert. 444 F. 2d at 799.

The emphasis upon the individual nature of Title VII rights in both Robinson and Air Line Stewards is particularly understandable in view of the class certifications in those actions. The classes in both suits were certified by the district court pursuant to Rule 23(b)(2). Since in a (b)(2) action the individual class members are not given an opportunity to opt out of the class, but are bound by the final judgment, courts take great care to make certain that an individual's Title VII rights are not denied through settlement. This was made especially clear in Air Line Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc., 490 F. 2d 636 (7th Cir. 1973), cert. denied, ___ U. S. ___, 94 S. Ct. 2406 (1974). In that case the district court had approved a settlement between the plaintiff union and the company, although the union had never consulted with the individual plaintiffs before entering into the settlement agreement. In reversing the district court's approval of the settlement, the Court of Appeals examined the nature

LEED THROUGH

of the Title VII rights involved. Concluding that Title VII rights were not comparable to rights created by the National Labor Relations Act, which could be accommodated and adjusted by a collective bargaining representative, the court stated:

> "An individual who claims to have been the victim of unlawful discrimination has the right to redress individually, whether the discrimination was an isolated act or a general practice." 490 F. 2d at 641. (Emphasis added)

In Bryan v. Pittsburgh Plate Glass Co., 494 F. 2d 799 (3rd Cir. 1974), cert. denied sub nom, Abate v. Pittsburgh Plate Glass Co., 419 U. S. 900 (1974), the Court of Appeals for the Third Circuit approved the settlement of a Title VII class action over the protests of 82 objecting plaintiffs. While Bryan at first glance may appear to represent an opposite trend in the law from Air Line Stewards and Robinson, it should be noted that the class in Bryan had been certified under Rule 23(b)(3). Unlike the petitioners here and the class members in Robinson and Air Line Stewards, the objecting plaintiffs in Bryan had been given an opportunity to opt-out of the litigation. By not exercising their rights to opt-out of the class, the Third Circuit held that the Bryan plaintiffs had elected to be bound by the results of the litigation or any court approved settlement of their claims. The holding in Bryan thus is completely in keeping with the view taken

BLEED THROUGH

by the Seventh and Fourth Circuits in Air Line Stewards and Robinson.

c. Application Of The Fairness Standard In The Present Case Conflicts With The Rule Making Statute Of 1934 and with Saylor v. Lindsley

While the Court of Appeals in the present case recognized that the settlement of a class action in a Title VII case "should receive careful review because of the public policy embodied in such legislation" (A-25), it failed to recognize any distinctions between class actions designed to vindicate individual civil rights and those filed to secure corporate well-being. Citing to a shareholder derivative suit the Court noted that assent of the class plaintiffs was not essential to a settlement, if the trial court found it fair and reasonable. See Saylor v. Lindsley, 456 F. 2d 896, 899-90 (2nd Cir. 1970). (A-26).

While the Court of Appeals considered Saylor to be a precedent for its ruling, an examination of the Second Circuit's opinion in that decision shows Saylor to be in direct conflict with the result of the appellate court in the present case. Here, as in Saylor, the named plaintiffs never authorized their counsel to enter into a settlement agreement. Compare 456 F. 2d at 898 and page 10 infra. Here, as in Saylor, objecting plaintiffs had a right to independent counsel, but such counsel was not available on a timely basis to provide adequate representation prior to the court's approval of the settlement. Thus, the Court in Saylor specifically pointed out that the court must:

BLEED THROUGH

> "exercise particular care to see to it that the non-assenting plaintiff has had a full opportunity to develop the basis for his objection."

Such an opportunity was not available to the objecting plaintiffs at the hearing on objections in the present case, since they were not represented by their own counsel until after the court had actually approved the settlement. Compare 456 F. 2d at 900 and 901 and pages 10, 11 and 12 infra.

While the Court of Appeals cited to Saylor as a precedent for its ruling, the Fourth Circuit's opinion fails to note that in Saylor, on the basis of facts very similar to those in the present case, the Second Circuit Court of Appeals had reversed the lower court's approval of a settlement agreement.

Interpretation of Rule 23(e) to permit settlement of a Title VII action certified under Rule 23 (b)(2) over the objections of the named plaintiffs under the circumstances described above must raise serious concerns.

The Rule Making Statute of 1934, 28 U.S.C. § 2072 (1948), specifically prohibits the Federal Rules of Civil Procedure from abridging, enlarging or modifying the substantive rights of litigants. The Court of Appeals for the Fourth Circuit, by affirming the district court's denial of affording named plaintiffs in a class action those rights which Title VII provides to litigants who proceed in

BLEED THROUGH

individual actions, has brought itself into conflict with the Rule Making Statute of 1934. See Sibbach v. Wilson & Co., 312 U. S. 1 (1941).

2. To Determine Whether A Court Imposed Settlement Of A Title VII Action Over The Objections Of All Named Plaintiffs Violates The Fifth Amendment's Guarantee Of Due Process

Settlement of a class action in a shareholder's derivative suit over the objections of a named plaintiff may be permissible since plaintiff's rights are derivative rather than personal. To permit the enforcement of a settlement over objections of class members in a Rule 23(b)(3) civil rights suit may also be permissible since such class members have had an opportunity to opt-out of the litigation.

However, here the facts are otherwise. The named plaintiffs authorized to act as representatives in a class action certified under Rule 23(b)(2) have been denied the right to litigate their personal claims, a right made available to them as a result of their compliance with the procedural requirements of Title VII. (Page 3, infra). To permit their claims to be compromised by class members, particularly those who have not filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) and who, thus, have no independent right of access to the courts is to turn Rule 23 on its head. Class members who may have little at stake are placed by such a ruling in a position of calling the tune to the named

BLEED THROUGH

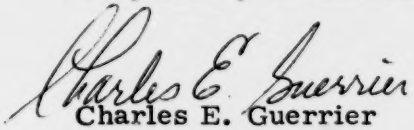
plaintiffs.

The federal rules permit the court to decertify a class action earlier certified or to create subclasses which require the separate interests of conflicting groups. Rule 23(c)(4) and (d)(4), Federal Rules of Civil Procedure. To force a settlement upon the named plaintiffs, particularly when these alternative measures are available, is to deny the named plaintiffs the procedural due process guaranteed them by the Fifth Amendment.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,



Charles E. Guerrier
Jane M. Picker
Barbara Kaye Besser
Barbara H. Mitchell
620 Keith Building
1621 Euclid Avenue
Cleveland, Ohio 44115
Phone (216) 621-3443

Attorneys for Petitioners